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## THE U.S. AND THEM: CUTTING FEDERAL BENEFITS TO LEGAL IMMIGRANTS

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*Give me your tired, your poor, Your huddled masses, yearning to  
breathe free, The wretched refuse of your teeming shore. Send  
these, the homeless, tempest-tost to me, I lift my lamp beside the  
golden door!*<sup>1</sup>

Contrary to the Statue of Liberty's invitation, the United States does not welcome all emigrants to join the American community. Even before that now-famous poem made its way onto the statue in 1886, the U.S. had enacted a law to exclude "any person unable to take care of himself or herself without becoming a public charge."<sup>2</sup> The public charge provision remains in the Immigration and Nationality Act (INA)<sup>3</sup>

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1. From "The New Colossus," by Emma Lazarus (1849-1887), inscribed on a bronze plaque inside the base of the Statue of Liberty in New York Harbor. 7 *ENCYCLOPAEDIA BRITANNICA MICROPAEDIA* 212 (15th ed. 1986). One author noted that Lazarus' lines symbolize the fact that America "turned [exile] into a triumph and placed its immigrants in the center of a national epic[.] . . . notwithstanding the condescension and the awful poetry" of the "old copper-plated cliché." H. Grunwald, *Home Is Where You Are Happy*, *TIME*, July 8, 1985, at 100-01, reprinted in STEPHEN H. LEGOMSKY, *IMMIGRATION LAW AND POLICY* 225-29 (1992).

2. LEGOMSKY, *supra* note 1, at 348 (citing Act of August 3, 1882, ch. 376, § 2, 22 Stat. 214 (1882)).

3. Immigration Act of 1990 § 212(a)(4), 8 U.S.C. § 1182(a)(4) (Supp. V 1993).

as both a ground for excluding aliens<sup>4</sup> and as a ground for deporting<sup>5</sup> aliens admitted to the U.S.<sup>6</sup> The government invokes the public charge provision more than any other exclusion provision in the INA.<sup>7</sup> Contrary to Lady Liberty's words, the U.S. tries to keep "wretched refuse" out.

But what of aliens who gain admission to the U.S. with bright prospects for self-sufficiency but fall on hard times thereafter? Currently, aliens legally residing in the U.S. generally enjoy the same eligibility for government benefits as citizens,<sup>8</sup> with some restrictions.<sup>9</sup> The future of alien eligibility for federal benefit programs, however, is uncertain. In response to widespread calls for welfare reform, President Bill Clinton promised during his 1992 campaign to "end welfare as we know it."<sup>10</sup>

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4. In general, exclusion refers to the INA's legal mechanism for keeping aliens out of the United States as a means of regulating the borders and ensuring that only desirable foreigners gain entry to the United States. The substantive grounds for excluding would-be immigrants appear at INA § 212(a), 8 U.S.C. § 1182(a) (Supp. V 1993). The INA defines "immigrant" as "every alien except an alien who is within one of the following classes of nonimmigrant aliens," which include a broad range of temporary visitors, such as foreign ambassadors and students. 8 U.S.C. § 1101(a)(15) (1988 & Supp. V 1993). See *infra* note 5 for the definition of "alien" under the INA.

INA § 212(a) contains over 30 grounds for exclusion. The substantive exclusion grounds generally provide that aliens are excludable if they pose health risks, § 212(a)(1); have been previously convicted of crimes, § 212(a)(2); pose security threats, § 212(a)(3); are likely to become public charges, § 212(a)(4); have violated or failed to comply with the immigration laws, § 212(a) (5), (6), (7); are ineligible for citizenship, § 212(a)(8); or fall under other miscellaneous grounds for exclusion, § 212(a)(9). 8 U.S.C. § 1182(a) (Supp. V 1993).

5. Deportation refers to the process of expelling aliens from the United States. The substantive grounds for deporting aliens appear in INA § 241(a), 8 U.S.C. § 1251(a) (Supp. III 1991). INA § 101(a)(3), 8 U.S.C. § 1101(a)(3) (1988), defines "alien" as "any person not a citizen or national of the United States." *Id.*

6. INA § 212(a)(4), 8 U.S.C. § 1182(a)(4) (Supp. V 1993). The INA provides that an alien who is "likely at any time to become a public charge is excludable." *Id.* The Act further provides that "[a]ny alien who, within five years after the date of entry, has become a public charge from causes not affirmatively shown to have arisen since entry is deportable." INA § 241(a)(5), 8 U.S.C. § 1251(a)(5) (Supp. III 1991).

7. LEGOMSKY, *supra* note 1, at 348; NATIONAL IMMIGRATION FORUM, QUESTIONS AND ANSWERS ON LEGAL IMMIGRANTS AND WELFARE REFORM (1994).

8. CHARLES GORDON & STANLEY MAILMAN, IMMIGRATION LAW AND PROCEDURE § 6.07[1] (1993).

9. See *infra* part II.

10. *The Presidential Tickets*, ORLANDO SENTINEL TRIB., Nov. 1, 1992, at D4. Clinton said:

Federal legislators also have proposed welfare reform,<sup>11</sup> and have introduced bills in both houses of Congress that purport to address perceived problems with the existing public benefits programs.<sup>12</sup> Several of these proposals would restrict noncitizens access or would render noncitizens ineligible to receive federal benefits.<sup>13</sup>

This Recent Development will present the arguments for and against the proposals to cut federal benefits to noncitizens. This Recent Development will focus on the four major federal welfare programs: Aid to Families with Dependent Children (AFDC),<sup>14</sup> Supplemental Security Income (SSI),<sup>15</sup> food stamps,<sup>16</sup> and Medicaid.<sup>17</sup> Part I discusses the origins of these programs, the benefits they provide, and the general eligibility criteria under each program. Part II examines alien eligibility under the four programs. Part III outlines how the major welfare reform proposals would affect alien eligibility for federal welfare benefits. Part IV and Part V discuss the arguments for and against restricting or eliminating public benefits for legal immigrants. Finally, Part VI argues that cutting welfare benefits to immigrants is an unsound political ploy.

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I believe we must put an end to welfare as we know it by making it a second chance, not a way of life. . . . We'll also provide people on welfare with the education, training and child care they need, so they can . . . move on to good-paying jobs. But we'll demand responsibility, too. After two years, those who can work will have to find a job either in the private sector or in community service.

*Id.*

11. See, e.g., Eric Pianin, *Campaign for Welfare Reform Runs Hot or Cool; In Oklahoma, Rep. McCurdy Steps Up the Rhetoric for Change in Bid for Senate Seat*, WASH. POST, Aug. 21, 1994, at A18. Pianin's story noted that "[v]oters say they are fed up with the current [welfare] system and favor changes that would force recipients to find work. Democratic and GOP candidates are finding virtue in stressing their commitment to radical change." *Id.*

12. Many view the current welfare programs as a self-perpetuating way of life, rather than a way out of poverty. See *id.*; see also, e.g., 140 CONG. REC. S57 (daily ed. Jan. 25, 1994) (statements of Sens. Brown and Dole) (discussing problems with current welfare system and Senate Republicans' welfare reform proposal); Jason DeParle, *From Pledge to Plan: The Campaign to End Welfare—A Special Report*, N.Y. TIMES, July 15, 1994, at A1 (detailing the Clinton Administration task force's effort to create a welfare reform proposal).

13. See *infra* part III.

14. Social Security Act, tit. IV, 42 U.S.C. §§ 601-87 (1988 & Supp. V 1993).

15. Social Security Act, tit. XVI, 42 U.S.C. §§ 1381-1383d (1988 & Supp. II 1990).

16. 7 U.S.C. §§ 2011-2030 (1988 & Supp. V 1993).

17. Social Security Act, tit. XIX, 42 U.S.C. §§ 1396-1396u (1988 & Supp. V 1993).

## I. THE MAJOR FEDERAL PUBLIC BENEFITS PROGRAMS

Unlike the Elizabethan "Poor Laws" of seventeenth century England, which treated welfare as a purely local concern,<sup>18</sup> the current welfare structure approaches such assistance as a shared local and federal responsibility.<sup>19</sup> The Social Security Act of 1935 exemplifies this

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18. The current array of laws that make government benefits available to poor or disabled persons trace their roots to the Elizabethan "Poor Laws." ARTHUR B. LAFRANCE, *WELFARE LAW: STRUCTURE AND ENTITLEMENT IN A NUTSHELL* § 1, at 1 (1979). The English Parliament passed "An Act for the Relief of the Poor" in 1601, which became known as the Poor Law. The act is reprinted in JUNE AXXIN & HERMAN LEVIN, *SOCIAL WELFARE: A HISTORY OF THE AMERICAN RESPONSE TO NEED* 9 (2d ed. 1982). In England, during the 1600s, formerly feudal lands became commercial farms, and farms became pastures for the wool industry. *Id.* at 16. For an historical account that traces the origins of social welfare from 400 B.C. to 1601 A.D., see WALTER I. TRATTNER, *FROM POOR LAW TO WELFARE STATE: A HISTORY OF SOCIAL WELFARE IN AMERICA* (5th ed. 1994) at 1-11. Tenant farmers and their families were displaced and moved toward towns. AXXIN & LEVIN, *supra*, at 16. "A shifting, rootless class of the permanently poor wandered across the countryside." LAFRANCE, *supra*, at 1. Axxin and Levin note that despite expanding industry in the towns, the new manufacturing plants could not absorb all those in need of work, "and bands of the unemployed wandered the English countryside as vagrants and beggars." AXXIN & LEVIN, *supra*, at 16. Private charities and the church proved inadequate to meet the challenge of an expanding lower class. LAFRANCE, *supra*, at 1.

The Poor Laws represented a new approach to the problem of poverty, based on the "assumption that the state had a responsibility to supplement ordinary efforts to relieve want and suffering and to insure the maintenance of life." TRATTNER, *supra*, at 11. Trattner also notes some "harsh" aspects of the Poor Law of 1601: parents and children could be held liable or responsible for each others' care, and "vagrants refusing work could be committed to a house of correction; whipped, branded, or put in pillories and stoned; or even put to death." *Id.*

Two key features characterized the Poor Laws: local responsibility for the local poor, and an emphasis on work. AXXIN & LEVIN, *supra*, at 15; LAFRANCE, *supra*, at 2; TRATTNER, *supra*, at 12. Because towns and villages jealously guarded their resources, the poor could generally obtain aid only at "their place of abode," and wandering indigents could be compelled to return to their homes. LAFRANCE, *supra*, at 2-3; AXXIN & LEVIN, *supra*, at 16. Under the Poor Law, local governments could establish facilities for the disabled — the "worthy poor" — while those deemed able to work faced criminal penalties if they did not do so. LAFRANCE, *supra*, at 2; *see also* TRATTNER, *supra*, at 11.

19. In 1923 the Supreme Court upheld the innovative Maternity Act of 1921, "one of the first examples of cooperative federal and state welfare legislation." LAFRANCE, *supra* note 18, at 7. The Act was intended to reduce infant mortality and preserve the health of mothers and their children. *Id.* States had challenged the law, claiming that it unconstitutionally imposed a federal burden on the states. *Id.* at 7-8. In *Massachusetts v. Mellon*, 262 U.S. 447 (1923), the Court rejected that claim, finding that the Maternity Act imposed no obligation on states, but instead simply made state participation in the

modern concept of joint responsibility.<sup>20</sup> The Social Security Act, and companion legislation such as the food stamps program, have evolved over the past 60 years. The Social Security Act now encompasses many welfare programs including Supplemental Security Income (SSI), Aid to Families with Dependent Children (AFDC), and Medicaid.

#### A. AFDC

What most people think of as "welfare" is AFDC,<sup>21</sup> "the paradigm of [welfare] programs."<sup>22</sup> In general, the program provides aid in the

Act's programs optional. *Id.* at 480. The Supreme Court dealt another blow to Poor Law traditions in *Edwards v. California*, 314 U.S. 160 (1941), when it struck down a California law that criminalized bringing nonresident indigents into the state. LAFRANCE, *supra* note 18, at 9-10. The *Edwards* decision rested on the ground that California could not attempt to isolate itself from the national problem of poverty. 314 U.S. at 173-4; LAFRANCE, *supra* note 18, at 11. The *Mellon* and *Edwards* decisions "laid to rest the Elizabethan concept that welfare was purely a local concern." LAFRANCE, *supra* note 18, at 13. Neither *Mellon* nor *Edwards* decided how far the federal government could go in establishing welfare programs with the potential to displace state programs. *Id.* Federal welfare legislation thus remained "vulnerable to constitutional challenge under the Tenth Amendment," which reserves traditional powers, like welfare under the Poor Laws, to the states. *Id.*

20. Act of Aug. 14, 1935, ch. 531, 49 Stat. 627 (1935).

21. 42 U.S.C. § 606(b) provides:

(b) The term "aid to families with dependent children" means money payments with respect to a dependent child or dependent children, or, at the option of the State, a pregnant woman . . . and includes (1) money payments to meet the needs of the relative with whom any dependent child is living (and the spouse of such relative if living with him and if such relative is the child's parent and the child is a dependent child by reason of the physical or mental incapacity of a parent or is a dependent child under section 607 of this title), and (2) payments with respect to any dependent child (including payments to meet the needs of the relative, and the relative's spouse, with whom such child is living, and the needs of any other individual living in the same home . . . who . . . is interested in or concerned with the welfare of such child or relative, or are made on behalf of such child or relative directly to a person furnishing food, living accommodations, or other goods, services, or items to or for such child, relative, or other individual . . .

42 U.S.C. § 606(b) (1988).

22. LAFRANCE, *supra* note 18, at 204. LaFrance explains the difference between public assistance, or "welfare," and "social insurance":

The term "welfare" is ordinarily used to describe programs having three characteristics: benefits are in the form of cash grants, with amounts determined by "need", with eligibility also being determined by need, not prior contributions. The paradigm of such programs is Aid to Families of Dependent Children (AFDC). In contrast are programs of social insurance, such as ["social security"], workmen's compensation and unemployment compensation. With insurance programs, benefits

form of cash payments to "dependent" children<sup>23</sup> who are "deprived" of parental support due to the death, continued absence, disability, or unemployment of one or both parents.<sup>24</sup> A relative who cares for a child can also receive aid, as can other essential household members.<sup>25</sup> Federal law provides for funding of AFDC benefits<sup>26</sup> and establishes a general procedural and substantive framework within which the states may create plans to provide AFDC benefits.<sup>27</sup> The states exercise

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and eligibility are largely determined by past earnings and paid regardless of need. Yet increasingly these programs depart from insurance or pension models: benefits are not limited to amounts paid, beneficiaries are expanded beyond the wage earner and the programs require increased subsidization from general tax revenues.

*Id.* at 204-05.

23. 42 U.S.C. § 606(a) (1988). Section 606(a) provides:

The term "dependent child" means a needy child (1) who has been deprived of parental support or care by reason of the death, continued absence from the home . . . or physical or mental incapacity of a parent, and who is living with his father, mother, grandfather, grandmother, brother, sister, stepfather, stepmother, stepbrother, stepsister, uncle, aunt, first cousin, nephew, or niece, in a place of residence maintained by one or more of such relatives as his or their own home, and (2) who is (A) under the age of eighteen, or (B) at the option of the State, under the age of nineteen and a full-time student in a secondary school . . . if, before he attains age nineteen, he may reasonably be expected to complete the program of such secondary school . . . .

*Id.* Section 607(a) further states that "[t]he term 'dependent child' shall, notwithstanding section 606(a) of this title, include a needy child who meets the requirements of section 606(a)(2) of this title, who has been deprived of parental support or care by reason of the unemployment . . . of the parent who is the principal earner . . . ." 42 U.S.C. § 607(a) (1988).

24. 42 U.S.C. § 606(a); *Immigrants' Benefits Might Be Restricted in Welfare Reform Initiatives*, 71 INTERPRETER RELEASES 521, 522 (1994) [hereinafter *Immigrants' Benefits*]. Originally, if a child lived with both parents, she could not receive assistance under AFDC, because the law hoped to encourage fathers who lived with their children to work. LAFRANCE, *supra* note 18, at 235-36. But commentators criticized that restriction as encouraging fathers to leave or stay away from the home in order to guarantee support for their children. *Id.* Congress responded by creating AFDC-UF, "an optional program for states to support families where *both* parents are present and unemployed." *Id.* (citing 42 U.S.C. § 607(a) (1988)).

25. 42 U.S.C. § 606(b) (1988).

26. See 42 U.S.C. § 601 (1988) (providing for federal appropriations for AFDC); 42 U.S.C. § 603 (1988) (providing for federal reimbursement to states of AFDC benefits paid by the states to recipients).

27. See 42 U.S.C. § 602(a) (1988 & Supp. II 1990) (prescribing lengthy and detailed requirements for state plans to provide AFDC benefits). Section 602(a) makes some of the requirements imposed on states optional, giving the states some freedom in administering the program. *Id.* State plans for provision of AFDC are subject to approval

substantial control over AFDC at the local level because they administer the program, determine eligibility income levels in part,<sup>28</sup> and determine benefit payments.<sup>29</sup>

### B. Food Stamps

The Food Stamp Act of 1964,<sup>30</sup> part of President Lyndon Johnson's "war on poverty," created the modern food stamp program and aimed to "expand the purchasing power of the needy."<sup>31</sup> Eligible households<sup>32</sup> receive food stamps based on their food costs and income.<sup>33</sup> Households with lower incomes and greater food costs receive larger allotments of food stamps.<sup>34</sup> The U.S. Department of

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by the federal government. 42 U.S.C. § 602(b) (1988).

28. Under 42 U.S.C. § 602(a)(7)(B) a state plan for providing AFDC benefits "shall determine ineligible for aid any family the combined value of whose resources . . . exceeds \$1,000 or such lower amount as the State may determine . . ." 42 U.S.C. § 602(a)(7)(B) (Supp. II 1990). Section 602(a)(8) in turn sets out detailed guidelines for determining a family's resources that states must incorporate into state plans. 42 U.S.C. § 602(a)(8) (1988 & Supp. II 1990).

29. 42 U.S.C. § 603(a)(1) states that the federal government "shall pay to each State which has an approved plan for [AFDC] . . . an amount equal to the sum of [certain] proportions of the total amounts expended . . . as aid to families with dependent children under the State plan." *Id.*

30. Pub. L. No. 88-525, 78 Stat. 703 (1964) (codified as amended at 7 U.S.C. §§ 2011-2030 (1988 & Supp. V 1993)). The Act was amended significantly in 1971 and 1977. See Pub. L. No. 91-671, 84 Stat. 2048 (1971); Pub. L. No. 95-113, 91 Stat. 958 (1977).

31. TRATTNER, *supra* note 18, at 326; see also 7 U.S.C. § 2011 (1988) (stating the congressional policy behind Food Stamp Program).

32. See generally 7 U.S.C. § 2014 (Supp. III 1991).

33. See 7 U.S.C. §§ 2017(a), 2014(d), (e), 2012(o) (1988 & Supp. V 1993).

34. 7 U.S.C. § 2017(a) provides:

The value of the allotment which State agencies shall be authorized to issue to any [eligible] households . . . shall be equal to the cost to such households of the thrifty food plan reduced by an amount equal to 30 per centum of the household's income, as determined in accordance with section 2014(d) and (e) of this title . . .

7 U.S.C. § 2017(a) (Supp. II 1990). 7 U.S.C. § 2012(o) provides:

"Thrifty food plan" means the diet required to feed a family of four persons consisting of a man and a woman twenty through fifty, a child six through eight, and a child nine through eleven years of age, determined in accordance with the Secretary's calculations. The cost of such diet shall be the basis for uniform allotments for all households regardless of their actual composition, except that the Secretary shall (1) make household-size adjustments . . . taking into account economies of scale.



Agriculture (USDA), which administers the program at the federal level,<sup>35</sup> annually adjusts the maximum amount of food stamps available to a household<sup>36</sup> and the maximum income above which a household will be ineligible to participate in the program.<sup>37</sup> States participate voluntarily in the food stamp program<sup>38</sup> and generally administer it at the local level.<sup>39</sup>

### C. Medicaid

Not long after passing the Food Stamp Act, Congress added Title XIX to the Social Security Act of 1935,<sup>40</sup> creating Medicaid, "a comprehensive program for medical assistance to the needy."<sup>41</sup> The

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7 U.S.C. § 2012(o) (Supp. IV 1992).

35. That the USDA administers the food stamp program represents something of an anomaly in the welfare context. The Department of Health and Human Services (HHS) administers the SSI program and the Medicaid program at the federal level, while the states generally administer AFDC, also with oversight by the Secretary of HHS. USDA's dominion over the food stamp program can be traced to the program's original purpose of "promot[ing] the interests of farmers, rather than those of poor consumers," by "distribut[ing] commodities acquired through federal price supports to low-income families." TRATTNER, *supra* note 18, at 303. The availability of foods and "the types of items provided . . . depended entirely on the availability of surplus foods rather than on the nutritional needs or desires of those participating in the program." *Id.* After the 1964, the focus of the food stamp program shifted to "raising levels of nutrition among low-income households," as well as "strengthen[ing] the Nation's agricultural economy." 7 U.S.C. § 2011 (1988).

36. 7 U.S.C. § 2014(c) (1988).

37. *Id.* Under the statute, a household income must not exceed the federally-established "poverty line." 7 U.S.C. § 2014(c) (1988).

38. 7 U.S.C. § 2013 authorizes the creation of the food stamp program, and provides that states may participate upon request. 7 U.S.C. § 2013 (1988).

39. *See generally* 7 U.S.C. § 2020 (1988 & Supp. V 1993). "The State agency of each participating State shall assume responsibility for the certification of applicant households and for the issuance of coupons [food stamps] and the control and accountability thereof." 7 U.S.C. § 2020(a) (1988). Section 2020(d) states that "each State desiring to participate in the food stamp program shall submit for approval a plan of operation specifying the manner in which such program will be conducted within the State." 7 U.S.C. § 2020(d) (1988). Section 2020(e) sets out at length "[r]equisites of State plan[s] of operation." 7 U.S.C. § 2020(e) (1988).

40. Social Security Amendments of 1965, Pub. L. No. 89-97, 79 Stat. 286, 343 (1965).

41. LAFRANCE, *supra* note 18, at 181. According to the Missouri Division of Family Services, the "overall purpose" of Medicaid "is to promote good health through treating/preventing illness; correcting/limiting disability and to provide [sic] rehabilitation services to persons with handicaps or disabilities." L.E. PARKS, MISSOURI DIVISION OF

program receives both state and federal funds.<sup>42</sup> As with the AFDC and food stamp program, states administer Medicaid in accordance with federal guidelines.<sup>43</sup> Because states control AFDC income eligibility levels, they also exercise substantial control over Medicaid eligibility.<sup>44</sup> Medicaid is designed to provide medical care for those receiving either SSI or AFDC payments. However, states may provide medical care for needy persons who do not receive these benefits.<sup>45</sup>

Unlike the AFDC, SSI, and food stamps programs, which provide financial benefits directly to beneficiaries, Medicaid operates as a "vendor payment program."<sup>46</sup> States generally make payments for health care directly to providers on behalf of eligible recipients, although state plans may provide that payments be made directly to the individual receiving care.<sup>47</sup> States must provide payment based on reasonable cost to the provider.<sup>48</sup> The law lists many medical services states must pay for, but the program does not cover all types of treatment.<sup>49</sup> Finally, the law requires states to set standards concerning the need for and quality of care provided under the program.<sup>50</sup>

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FAMILY SERVICES, FAMILY SERVICES 11 (1993); *see also* 42 U.S.C. § 1396 (1988 & Supp. IV 1992) (stating the congressional purpose for the Medicaid program).

42. *See* 42 U.S.C. § 1396 (1988) (authorizing federal appropriations for Medicaid); 42 U.S.C. § 1396a(a)(2) (1988) (providing that states Medicaid plans must "provide for financial participation by the state"); 42 U.S.C. § 1396b(a) (1988 & Supp. IV 1991) (providing for federal reimbursement of certain percentages of state costs under Medicaid program).

43. *See generally* 42 U.S.C. §§ 1396a-1396c (1988 & Supp. III 1991).

44. LAFRANCE, *supra* note 18, at 181-82.

45. *See* 42 U.S.C. § 1396a(a)(10)(A)(i)(I), (II) (1988 & Supp. II 1990) (providing that state Medicaid plans must make medical assistance available to, *inter alia*, "all individuals who are receiving aid" under AFDC or SSI).

46. LAFRANCE, *supra* note 18, at 181-82.

47. 42 U.S.C. § 1396a(a)(32) (1988 & Supp. II 1990).

48. *See, e.g.*, 42 U.S.C. § 1396a(a)(13)(A) (1988 & Supp. II 1990) (requiring state Medicaid plans to provide for payment of, *inter alia*, hospital services at rates "reasonable and adequate" to meet costs incurred by "efficiently and economically operated facilities").

49. LAFRANCE, *supra* note 18, at 184, 186; *see* 42 U.S.C. § 1396d(a) (1988 & Supp. II 1990) (listing types of medical care available under Medicaid).

50. *See* 42 U.S.C. § 1396a(a)(30)(A) (1988) (requiring states to provide procedures "to safeguard against unnecessary utilization" of Medicaid); 42 U.S.C. § 1396a(a)(33)(A) (1988) (requiring state Medicaid plans to provide for review "of the appropriateness and quality of care and services furnished to [Medicaid] recipients").

#### D. *Supplemental Security Income and Other Federal Aid Programs*

SSI, the most recently enacted of the major welfare programs,<sup>51</sup> guarantees benefits to blind, disabled, or aged individuals with low incomes.<sup>52</sup> These benefits include a set annual income for eligible persons.<sup>53</sup> While the states administer the AFDC, food stamps, and Medicaid programs, the federal government largely controls SSI.<sup>54</sup>

In addition to the "big four" federal programs,<sup>55</sup> the federal government provides many other benefits to persons in need.<sup>56</sup> Federal programs serve health, employment, family, nutrition, housing, education, and utility needs.<sup>57</sup> Congress has generally made these federal benefits available to all eligible persons legally residing in the United States.<sup>58</sup>

### II. ALIENS' CURRENT ELIGIBILITY FOR AFDC, SSI, FOOD STAMPS, AND MEDICAID

An alien's eligibility for federal benefits depends on the alien's immigration status and the requirements of the particular benefits programs.<sup>59</sup> The federal benefits laws, however, may bar an alien from receiving federal benefits during the first several years following

51. Social Security Amendments of 1972, Title III, Pub. L. No. 92-603, 86 Stat. 1465 (1973).

52. *Id.* See generally 42 U.S.C. §§ 1381, 1381a, 1382 (1988 & Supp. II 1990).

53. See 42 U.S.C. § 1382(b).

54. LAFRANCE, *supra* note 18, at 223.

55. *Immigrants' Benefits*, *supra* note 24, at 523.

56. See, e.g., H.R. 3500, 103d Cong., 1st Sess. § 601 (1993) (listing 61 federal benefits programs).

57. See *id.*

58. Congress has generally made benefit eligibility distinctions turn solely on need. Congress has also expressly provided that "[n]o person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000e (1988 & Supp. III 1991) (prohibiting employment discrimination based on, inter alia, sex).

59. DAVID CARLINER ET AL., *THE RIGHTS OF ALIENS AND REFUGEES: THE BASIC ACLU GUIDE TO ALIEN AND REFUGEE RIGHTS* 214 (1990). For a comprehensive, practical resource, see NATIONAL IMMIGRATION LAW CENTER, *GUIDE TO ALIEN ELIGIBILITY FOR FEDERAL PROGRAMS* (3d. ed. 1994) (hereinafter *GUIDE TO ALIEN ELIGIBILITY*).

admission if the alien is found “likely . . . to become a public charge”<sup>60</sup> by becoming dependent on a support program.<sup>61</sup>

An alien may face deportation if she is found to have become a public charge within five years after admission to the U.S. unless she became a public charge for reasons arising after her admission.<sup>62</sup> An alien facing exclusion under the public charge provision can avoid exclusion by submitting an “affidavit of support,” in which a sponsor promises to support the alien should she become unable to support herself. If an alien avoids exclusion by submitting an affidavit of support, the sponsor’s income is deemed available to the immigrant for a period of years following the immigrants’ admission.<sup>63</sup> For purposes of determining the alien’s eligibility for benefits based on need, the sponsor’s income is added to the alien’s income.<sup>64</sup> Because the combined income of an alien and her sponsor usually exceeds the income eligibility limits of the federal programs, aliens who have filed affidavits of support generally cannot obtain benefits during “deeming” periods.<sup>65</sup> Currently, the AFDC and food stamps programs have three-year deeming periods,<sup>66</sup> and the SSI program has a five-year period.<sup>67</sup> Deeming does not apply under Medicaid.<sup>68</sup>

Except for deeming restrictions and the limitations in specific benefits programs, aliens admitted for permanent residence, admitted as refugees, or granted asylum can usually obtain federal benefits.<sup>69</sup> The AFDC, Medicaid, and SSI programs also provide that aliens “permanently residing under color of law” (PRUCOL) may qualify for

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60. INA § 212(a)(4), 8 U.S.C. 1182(a)(4) (Supp. V 1993); *see supra* notes 5-6 and accompanying text.

61. LEGOMSKY, *supra* note 1, at 348 (citing 22 C.F.R. § 40.7 (a)(15) (1989)).

62. INA § 241(a)(5), 8 U.S.C. § 1251(a)(5) (1988 & Supp. IV 1992).

63. NATIONAL IMMIGRATION FORUM, LEGAL IMMIGRANTS AND WELFARE REFORM FINANCING (1994) [hereinafter NIF, WELFARE REFORM FINANCING].

64. *Id.*; *see* 42 U.S.C. § 615(b) (1988) (setting out the method for computing a sponsored alien’s income under AFDC program); *see also* 7 U.S.C. § 2014(i)(2) (1988) (food stamps); 42 U.S.C. § 1382j(b) (1988) (SSI).

65. NIF, WELFARE REFORM FINANCING, *supra* note 63.

66. 42 U.S.C. § 615(a) (1988) (AFDC deeming); 7 U.S.C. § 2014 (i)(1) (1988) (food stamps deeming).

67. 42 U.S.C. § 1382j(a) (1988).

68. NIF, WELFARE REFORM FINANCING, *supra* note 63.

69. CARLINER, *supra* note 59, at 214.

benefits.<sup>70</sup> The PRUCOL category has been controversial<sup>71</sup> because its definition varies according to each benefit program and case law in different jurisdictions.<sup>72</sup> Temporary visitors to the United States, "nonimmigrants"<sup>73</sup> such as tourists and students, and undocumented aliens who enter or remain in the United States in violation of the INA are barred from receiving benefits in most cases.<sup>74</sup>

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70. See, e.g., 45 C.F.R. § 233.50 (1994). Section 233.50 provides that state plans under the AFDC program and other programs shall provide that an otherwise eligible individual, dependent child, or a caretaker relative or any other person whose needs are considered in determining the need of the child or relative claiming aid, must be either:

(a) A citizen, or (b) An alien lawfully admitted for permanent residence or otherwise *permanently residing in the United States under color of law*, including certain aliens lawfully present in the United States as a result of the application of the following provisions of the Immigration and Nationality Act: (1) Section 207(c), in effect after March 31, 1980 — Aliens Admitted as Refugees. (2) Section 203(a)(7), in effect prior to April 1, 1980 — Individuals who were Granted Status as Conditional Entrant Refugees. (3) Section 208 — Aliens Granted Political Asylum by the Attorney General. (4) Section 212(d)(5) — Aliens Granted Temporary Parole Status by the Attorney General, or (c) An alien granted lawful temporary resident status pursuant to section 201, 302, or 303 of the Immigration Reform and Control Act of 1986 (Pub. L. 99-603)

....

All other aliens granted lawful temporary or permanent resident status, pursuant to sections 201, 302, or 303 of the Immigration Reform and Control Act of 1986, are disqualified for five years from the date lawful temporary resident status is granted.

*Id.* (emphasis added); see also 7 U.S.C. § 2015(f). Section 2015(f) restricts eligibility under the food stamp program to U.S. residents who are either citizens, permanent resident aliens, and certain other aliens whom the Attorney General has allowed to remain in the United States. INA § 103(a), 8 U.S.C. § 1103(a), charges the Attorney General "with the administration and enforcement of this chapter and all other laws relating to the immigration and naturalization of aliens . . ." *Id.*; see also *Holly v. Lavine*, 553 F.2d 845 (2d Cir. 1977) (holding PRUCOL includes an alien permitted to remain in the U.S. indefinitely), *cert. denied*, 435 U.S. 947 (1978).

71. CARLINER, *supra* note 59, at 214.

72. *Immigrants' Benefits*, *supra* note 24, at 521. Courts have construed PRUCOL broadly under the SSI and Medicaid laws, and more narrowly under AFDC. GUIDE TO ALIEN ELIGIBILITY, *supra* note 59, at 66. For an in-depth analysis of the scope of alien PRUCOL eligibility for public benefits under federal case and statutory law, see Daniel Stein & Steven Zanowic, *Permanent Resident Under Color of Law: Opening the Door to Alien Entitlement Eligibility*, 1 GEO. IMMIGR. L.J. 231 (1986).

73. See *supra* note 4 (describing the definition of "immigrant").

74. Under federal law, illegal immigrants, or "undocumented aliens," can obtain only emergency medical care under Medicaid, 42 U.S.C. § 1396b(v) (1988 & Supp. V 1993), some housing and educational benefits, including school lunches and breakfasts, and, in the case of pregnant women, some nutritional assistance. Michael Fix & Jeffrey S. Passel,

### III. HOW THE PENDING WELFARE REFORM PROPOSALS WOULD AFFECT LEGAL ALIENS' ACCESS TO FEDERAL BENEFITS PROGRAMS

An anti-welfare, anti-immigrant sentiment currently prevails in the United States.<sup>75</sup> Seizing on this isolationist sentiment,<sup>76</sup> legislators in the 103rd Congress proposed that immigrants bear the burden of welfare reform. All of the major welfare reform proposals offered in the most recent Congress would have financed costly reform measures in whole or in part by cutting benefits to classes of currently eligible legal immigrants. Such reform would move the status of legal immigrants closer to that of illegal immigrants, who receive almost no federal benefits.<sup>77</sup>

House and Senate bills introduced by Republicans proposed the most severe limits on alien access to federal benefits.<sup>78</sup> The House bill that enjoyed the greatest support among the proposed welfare reform bills in late 1994 provided that "no alien shall be eligible" for over 61 federal programs.<sup>79</sup> Every federal benefits program, including AFDC, SSI, food stamps, and Medicaid, as well as the school lunch program, housing

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*Perspective on Immigration: Who's on the Dole? It's Not Illegal Immigrants*, L.A. TIMES, Aug. 3, 1994, at B7; see also GUIDE TO ALIEN ELIGIBILITY, *supra* note 59, at xi.

75. More than two-thirds of American voters surveyed in April 1994 "believe that most people on welfare are taking advantage of the system." Pianin, *supra* note 11, at A18. Pianin cites a Gallup/CNN/USA Today survey stating that two-thirds of Americans also believe "too many immigrants are coming in to the country." *Id.*; see also Joel Kotkin, *Can We Reheat the Melting Pot?: Yes, If Only the Immigration Extremists, Left and Right, Would Let Us*, WASH. POST, July 3, 1994, at C2.

76. See Pianin, *supra* note 11, at A18; *supra* notes 10-12 and accompanying text.

77. Illegal immigrant ineligibility for benefits is nothing new under federal law. As noted above, undocumented aliens can obtain only very limited benefits under federal law. The House Republicans' proposal would equate legal immigrants and undocumented aliens under the federal welfare laws. Even the Clinton proposal would shift the status of legal immigrants toward that of illegal immigrants. "This would be a significant change in public policy . . . a departure from a major thrust of immigration policy over the last decade," because welfare reform proposals "go beyond seeking to restrict the rights and privileges of illegal immigrants to changing the rules for legal immigrants." Fix & Passel, *supra* note 74. That unprecedented change in public policy seems likely, as all of the major welfare proposals include some restrictions on noncitizen access to federal benefits programs.

78. H.R. 3500, 103d Cong., 1st Sess. (1993). Rep. Robert H. Michel (R-Illinois) introduced the bill.

79. *Id.* § 601.

assistance programs, educational programs, employment programs, and immunizations programs, was included in the bill.<sup>80</sup> Another House Republican proposal would have made noncitizens ineligible for SSI and Medicaid, two programs most frequently utilized by immigrants.<sup>81</sup> Finally, a milder Senate Republican proposal would have prohibited all classes of immigrants, other than aliens admitted for permanent residence and refugees, from receiving benefits under the four major programs and the unemployment insurance program.<sup>82</sup>

A House Democratic bill suggested making legal immigrants ineligible for the AFDC, SSI, food stamps, and Medicaid programs,

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80. *Id.* § 601(d). The House Republican bill did make two permanent exceptions from the alien ineligibility provision. *Id.* § 601(b). It excepted refugees during their first six years of U.S. residence, and permanent resident aliens aged 75 or older who have lived in the United States for "at least five years." *Id.* § 601(b)(2). Further, the proposed restrictions would not have gone into effect against lawfully admitted permanent resident aliens for one year following enactment of the bill. *Id.* § 601(b)(3). The only program for which noncitizens not within one of the two permanent exceptions which would have been eligible was emergency Medicaid. *Id.* § 601(c).

Other proposals by House Republicans would have afforded noncitizens the same treatment as that proposed in H.R. 3500. *See* H.R. 4473, 103d Cong., 2d Sess. § 406 (1994); H.R. 4566, 103d Cong., 2d Sess. § 406 (1994). Unlike H.R. 3500, however, these two bills, sponsored by Missouri Republican Jim Talent, would have rendered noncitizens ineligible for only 58 federal programs, and made no exceptions to that bar. *Id.* S. 2134, a proposal by Senate Republicans, mirrored H.R. 4473 and H.R. 4566. S. 2134, 103d Cong., 2d Sess. (1994).

81. H.R. 4419, 103d Cong., 2d Sess. (1994); *see also Will Congress SAVE Public Benefits for Aliens?*, 71 INTERPRETER RELEASES 753 (1994); NATIONAL IMMIGRATION FORUM, QUESTIONS AND ANSWERS ON LEGAL IMMIGRANTS AND WELFARE REFORM (1994).

82. S. 1795, 103d Cong., 2d Sess. (1994). The bill would have also made any legal immigrant who received benefits for more than one year deportable on public charge grounds. *Id.* § 601. S. 1795 proposed extending the deeming period for aliens who have avoided exclusion by filing an affidavit of support. *Id.* It provided that an alien's sponsor's income would be deemed available to the alien, thereby effectively barring the alien from obtaining benefits, until the alien became naturalized as a citizen. *Id.* S. 1795 would have also established deeming under the Medicaid and unemployment insurance programs, which, as with the other affected programs, would have extended until an alien obtained citizenship. *Id.* In most cases, S. 1795 would have effectively extended the deeming period to at least five years after an alien gained admission to the U.S., the point at which most immigrants become eligible to apply for citizenship. Finally, S. 1795 would have required state agencies administering the AFDC program to report illegal immigrants. *Id.*

except for the latter in emergency situations.<sup>83</sup> The proposal, however, would have authorized appropriations of up to \$5 billion per year to help states pay for any benefits they provided to resident aliens.<sup>84</sup> Moreover, the proposal would have authorized states to sue immigrants' sponsors to recoup benefits paid to immigrants.<sup>85</sup> Finally, the Democrat's proposal would have given states the option of denying benefits to immigrants altogether.<sup>86</sup>

In the wake of these legislative proposals, the Clinton Administration offered a proposal that would have reduced federal welfare costs and would have less drastically affected immigrants' eligibility for public benefits.<sup>87</sup> The Clinton proposal propounded extending deeming until an alien became naturalized if an alien's sponsor's income exceeded the national average.<sup>88</sup> According to the National Immigration Forum (NIF), an immigrants' rights group, the Clinton proposal would have also made Medicaid and SSI benefits available only to "the narrow categories" of aliens eligible under the AFDC and food stamps programs.<sup>89</sup> Finally, the Clinton administration's proposal would have allowed state and local governments to make immigrants who are ineligible for federal benefits

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83. H.R. 4414, 103d Cong. 2d Sess. (1994); NIF, WELFARE REFORM FINANCING, *supra* note 63. This "Mainstream Forum" proposal would, however, have made exceptions for refugees and asylees for six years after admission. H.R. 4414. The forum's bill would have also excepted immigrants over 75 who have resided in the United States for five years. *Id.*

84. H.R. 4414.

85. *Id.* The retroactivity of such a provision is a significant issue.

86. NIF, WELFARE REFORM FINANCING, *supra* note 63. Such a law would effectively eviscerate *Graham v. Richardson*, 403 U.S. 365 (1971), which held that states may not constitutionally deny benefits to immigrants under the Equal Protection Clause of the Fourteenth Amendment. The Court stated that "Congress has not seen fit to impose any burden or restriction on aliens who become indigent after their entry into the United States. [State] laws that restrict the eligibility of aliens for welfare benefits merely because of their alienage conflict with these overriding national policies in an area constitutionally entrusted to the Federal Government." *Id.* at 377-78. In light of that language, it seems likely that Congress could allow states to restrict welfare to aliens.

87. The Clinton proposal appeared in Congress as H.R. 4605, 103d Cong., 2d Sess. (1994), and S. 2224, 103d Cong., 2d Sess. (1994).

88. H.R. 4605 § 903(b); S. 2224 § 903(b); Fix & Passel, *supra* note 74, at B7.

89. NIF, WELFARE REFORM FINANCING, *supra* note 63.



also ineligible for local benefits.<sup>90</sup>

Groups outside Congress have suggested other ways to limit immigrants' use of federal benefits and to save money other than making immigrants ineligible to receive benefits or extending deeming. One group, the Commission on Immigration Reform (CIR),<sup>91</sup> "vigorously rejected" proposals to deny legal immigrants benefits.<sup>92</sup> The CIR instead advocated deporting aliens who, before coming to the United States, failed to disclose circumstances that would make them eligible for public assistance.<sup>93</sup> The CIR also advocated making affidavits of support legally enforceable.<sup>94</sup> Others<sup>95</sup> have argued that "immigration control" must accompany welfare reform because immigrants might compete with welfare recipients for jobs.<sup>96</sup>

#### IV. THE ARGUMENTS FOR CUTTING ALIENS' FEDERAL BENEFITS

Two key concerns motivate proposals to cut federal benefits to

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90. *Id.*; H.R. 4605 § 903(c); S. 2224, § 903(c).

91. The Commission was created by the Immigration Act of 1990, Pub. L. No. 101-649, as amended by Pub. L. No. 102-232, Title III, § 302(c)(1), 105 Stat. 1744 (1991), to study the effects of U.S. immigration policy, including "[t]he social, demographic, and natural resources impact of immigration." *Id.*

92. Louis Freedberg, *Panel Urges Reform on Immigrants, Welfare; Deportation Sought for Those Who Lie About Disabilities*, S.F. CHRON., Aug. 10, 1994, at A2 ("The commission is not prepared to lift the safety net out from under individuals who, we hope, will become integral parts of our social community," said Barbara Jordan, who heads the commission.").

93. *Id.*

94. *Id.* ("[A]ffidavits [of support] are currently merely a 'moral obligation.'").

95. *E.g.*, Virginia D. Abernethy, *Slowing Influx Would Speed Up Welfare Reform*, ROCKY MOUNTAIN NEWS, Aug. 21, 1994, at A94; *Welfare Reform Requires Having Immigration Cap*, CHI. SUN-TIMES, June 29, 1994, at 34.

96. See Abernethy, *supra* note 95, at A94 (stating that welfare reform will require the creation of 2.3 million new jobs per year, according to the U.S. Department of Health and Human Services). According to one commentator, "[a] consensus is developing among economists that one unskilled American worker's job is lost for every six or seven immigrants who enter." *Id.*

legal immigrants. The first concern is funding welfare reform.<sup>97</sup> One report estimates that reform could cost up to \$15 billion,<sup>98</sup> and the Clinton Administration's proposal could cost \$6 billion per year by 1999.<sup>99</sup> To raise this revenue, many politicians would prefer to cut benefits to an unpopular group which cannot vote, rather than raise taxes, which would affect voters as well as nonvoters.<sup>100</sup> Eliminating AFDC, SSI, food stamps, and Medicaid benefits to aliens would save \$21.3 billion over the next five years.<sup>101</sup>

The second major concern driving the move to cut aliens' benefits is not only financial, but also emotional. Critics of the current system believe that the availability of welfare benefits is a "magnet" that draws indigent aliens to the United States. These critics claim that many immigrants are low-skill individuals who require benefits for support.<sup>102</sup>

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97. One report notes that "[u]nder the 1990 budget law, increases in expenditures for entitlement programs, such as welfare programs, must be paid for by either increasing taxes or cutting similar entitlement programs." *Immigrants' Benefits*, *supra* note 24, at 521.

98. See William Claiborne, *Immigrants' Benefits at Risk: House Alliance Wants Funds for Welfare Reform*, WASH. POST, Mar. 24, 1994, at A1 (citing a Congressional Budget Office estimates) [hereinafter Claiborne, *Immigrants*].

99. Ronald Brownstein, *Welfare Aid to Older Immigrants Imperiled*, L.A. TIMES, Mar. 17, 1994, at A3.

100. Charles Wheeler, directing attorney for the National Immigration Law Center in Los Angeles, sees the proposals to cut federal benefits to immigrants as an effort to save money at the expense of a unpopular group. Claiborne, *Immigrants*, *supra* note 98, at A1. One newspaper story observed "a growing trend . . . of legislators looking toward immigrant entitlements as a convenient budget-cutting target." *Id.*

101. The Congressional Budget Office (CBO) found that if enacted, H.R. 3500 would save \$8 billion in its fifth year. *Immigrants' Benefits*, *supra* note 24, at 522. The CBO said that cutting benefits to citizens would save \$9.4 billion in SSI, \$8.1 billion in Medicaid, \$2.8 billion in food stamps, and \$1 billion in AFDC over the next five years. See William Claiborne, *Clinton Task Force Weighs Cutting Welfare Benefits to Noncitizens*, WASH. POST, Dec. 19, 1993, at A10 [hereinafter Claiborne, *Task Force*].

102. The Federation for American Immigration Reform (FAIR), an organization that advocates "a moratorium on all immigration except spouses and minor children of U.S. citizens and a limited number of refugees," explains the welfare magnet theory in its literature. FEDERATION FOR AMERICAN IMMIGRATION REFORM, FOR YOUR INFORMATION: WHAT IS THE FEDERATION FOR AMERICAN IMMIGRATION REFORM? (1994) According to FAIR, "[t]he relative skill level of immigrants has declined" so that "current immigration flow is dominated by low-skilled individuals from under-developed countries." FEDERATION FOR AMERICAN IMMIGRATION REFORM FAIR RESEARCH SYNOPSIS: NEW ANALYSIS REDRAWS PICTURE OF IMMIGRANT PERFORMANCES AND SUCCESS (1994). FAIR attributes the decline in the quality of immigrants to "the switch from national origin

The increasing use of the SSI program by elderly immigrants illustrates the welfare magnet problem. Under the INA, alien parents of U.S. citizens can obtain visas to reunite with their children.<sup>103</sup> Because these elderly immigrants have never worked in the U.S., however, they cannot obtain Social Security benefits.<sup>104</sup> As an alternative to Social Security, older immigrants turn to SSI.<sup>105</sup> Critics claim that this drains resources that should instead benefit citizens who have paid taxes throughout their working lives.<sup>106</sup>

Cutting immigrants' benefits is an easy way to make money available to pay for welfare reform. The need for funds coincides with independent reasons for cutting benefits to immigrants, such as eliminating the supposed welfare magnet problem. Many reformers argue that cutting federal benefits to aliens will thus satisfy two important purposes while simultaneously ending abuses of the welfare system.<sup>107</sup>

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quotas to family reunification as the criterion for giving visas." *Id.* "The fact that the United States punishes its most able (by taxes) and rewards its least able (by public subsidies) creates a magnet for unskilled individuals in worse-off countries," FAIR concludes. *Id.*

103. See INA § 201(b)(2)(A)(i), 8 U.S.C. § 1151(b)(2)(A)(i) (1988 & Supp. IV 1992).

104. *Immigrants' Benefits*, *supra* note 24, at 522. In 1982, 128,000 immigrants received SSI benefits. Brownstein, *supra* note 99. The SSI program also pays benefits to the blind and disabled, so not all of the immigrants receiving benefits are elderly parents of citizens. Today the program pays benefits to over 600,000 immigrants. *Id.* In 1992, immigrants accounted for 11 percent of SSI recipients. Claiborne, *Task Force*, *supra* note 101, at A10.

105. In 1985, 40,000 such immigrants entered the country. Claiborne, *Immigrants*, *supra* note 98, at A10. That number now approaches 65,000 annually. *Id.*

106. "The idea that immigrants can bring in their parents to retire here, to incur expensive medical treatment, is a very troubling trend," said FAIR's executive director, Dan Stein. *Id.* Mr. Stein's statement is misleading because only citizens can bring alien parents into the U.S. Immigrants can, however, become citizens and then sponsor their parents' immigration. "We can't allow people to bring their parents here from around the world to live and die at taxpayer expense." *Id.* (quoting Dan Stein, FAIR Executive Director). "We are offering them a choice. They have a choice of staying where they are or coming to the U.S. and not draining our services that they didn't contribute to," said Representative Tom DeLay (R-Tex.). *Id.*

107. See Claiborne, *Task Force*, *supra* note 101. If at this point the reader generally finds merit in the arguments favoring cutting federal benefits to immigrants, the reader can appreciate how effectively those arguments appeal to popular stereotypical notions about immigrants and why they come to the United States. The emotional appeal of those arguments can even lead one to overlook the obvious fallacy behind the "welfare magnet" argument: cutting off benefits to aliens already legally in this country, as opposed to

## V. THE ARGUMENTS AGAINST CUTTING ALIENS' FEDERAL BENEFITS

Those opposed to eliminating federal benefits to aliens argue that the welfare magnet theory and the notion that immigrants do not contribute to the U.S. economy are misconceived. Proimmigrant groups argue that cutting federal benefits to aliens will simply shift the welfare burden to states. These groups argue for compassion, fairness, and equality instead of short-sightedly excluding aliens.

The National Immigration Forum (NIF) argues that the welfare magnet theory has no empirical support.<sup>108</sup> According to the NIF, immigration officials screen legal immigrants seeking admission to the U.S. and exclude those who may become public charges.<sup>109</sup> Other proimmigrant groups note that two recent surveys found that immigrants are more often attracted to the United States because of work opportunities or political freedom than by the possibility of receiving public benefits.<sup>110</sup> According to a *Washington Post* editorial, refugees who have fled persecution comprise one-fourth of immigrant welfare recipients, including a large number of elderly Soviet Jews.<sup>111</sup>

While some legal immigrants do turn to welfare, statistics indicate that they do so at a rate comparable to or lower than that at which citizens seek assistance.<sup>112</sup> Refugees and the elderly receive a substantial portion of total immigrant benefits.<sup>113</sup> In contrast, only a

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making only future immigrants ineligible for benefits, does nothing to eliminate the "welfare magnet." Once one recognizes the failure of the magnet argument to justify cutting off benefits to immigrants already legally in this country, the only justification remaining for that proposal is the less vocal assumption that non-citizens are somehow less deserving of benefits as a class, despite the fact that, as a class, they work and pay taxes.

108. NATIONAL IMMIGRATION FORUM, QUESTIONS AND ANSWERS ON LEGAL IMMIGRANTS AND WELFARE REFORM (1994).

109. *Id.*

110. Claiborne, *Task Force*, *supra* note 101.

111. *Leave the Immigrants Be*, WASH. POST, Feb. 20, 1994, C6. Fix and Passel note that refugees are the only immigrant group generally able to obtain welfare benefits upon their arrival. Fix & Passel, *supra* note 74, at B7. They further point out that most refugees arrive without jobs or family networks, and that over time refugees' use of public benefits decreases. *Id.*

112. According to Fix and Passel, 4.7% of all legal immigrants receive cash government benefits like AFDC or SSI, compared to 4.2% of natives. Fix & Passel, *supra* note 74, at B7.

113. *Id.*

small percentage of working-age immigrants who are not refugees use welfare.<sup>114</sup>

Congress must consider proposals to eliminate welfare benefits to immigrants in light of immigrants' economic contributions. According to the NIF, immigrants contribute far more in taxes than they use in welfare benefits.<sup>115</sup> Immigrants also make positive contributions to the U.S. economy by creating jobs through entrepreneurial activity,<sup>116</sup> producing income equal to their share of the population,<sup>117</sup> and being self-employed at a higher rate than citizens.<sup>118</sup>

Denying immigrants federal public benefits will not eliminate the needs of poor or disabled immigrants, but will merely shift this burden to states and local communities,<sup>119</sup> especially to those states with large numbers of immigrant residents, like New York and California.<sup>120</sup> In urban areas, where ninety-three percent of immigrants live, this burden may be felt even more intensely.<sup>121</sup> The NIF estimates that reducing federal benefits to immigrants will shift \$20 billion in costs to state and local providers over the next five years.<sup>122</sup> Furthermore, community resources, such as food banks, health centers, and other nonprofit

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114. *Id.* A study by the Urban Institute found that "2.3 percent of immigrants entering from non-refugee sending countries during the 1980s were reported to be using public benefits in 1989 — lower than the welfare participation rate of natives (3.3 percent)." NATIONAL IMMIGRATION FORUM, QUESTIONS AND ANSWERS ON LEGAL IMMIGRANTS AND WELFARE REFORM (1994).

115. NIF, WELFARE REFORM FINANCING, *supra* note 63. Other sources cite less dramatic figures, but still note that immigrants produce substantially more in income than they consume in public benefits. See David Marzahl & Rob Paral, *Immigrants, Myths and Welfare*, CHI. TRIB., Aug. 23, 1994, at 15.

116. NIF, WELFARE REFORM FINANCING, *supra* note 63.

117. *Id.*

118. "They are self-employed at a higher rate than natives and, on average, earn as much as native entrepreneurs." *Id.* According to Fix and Passel, only 7% of natives are self-employed, compared to 7.2% of immigrants. Fix & Passel, *supra* note 74, at B7.

119. Marzahl & Paral, *supra* note 115.

120. States with large numbers of immigrant residents like New York and California "would be faced with enormous pressures on public health clinics and other local resources," says the National Immigration Forum. NIF, WELFARE REFORM FINANCING, *supra* note 63.

121. NIF, WELFARE REFORM FINANCING, *supra* note 63.

122. NATIONAL IMMIGRATION FORUM, IMPACT OF THE "MAINSTREAM FORUM" WELFARE PROPOSAL ON LEGAL IMMIGRANTS (1994).

community groups will experience increased demands.<sup>123</sup>

Some proponents of reducing benefits to immigrants suggest that if "these people" want U.S. aid, they should become naturalized citizens. The NIF points out, however, that many obstacles hinder naturalization, especially for elderly immigrants.<sup>124</sup> First, immigrants generally must reside in the U.S. for five years before they can become citizens.<sup>125</sup> Administrative processing by the Immigration and Naturalization Service currently adds one to two years.<sup>126</sup> Second, aliens must demonstrate proficiency in English and history in order to become citizens.<sup>127</sup> Elderly or disabled immigrants may experience difficulty obtaining education and acquiring the requisite degree of skill.<sup>128</sup> For example, New York and Los Angeles have waiting lists of 50,000 immigrants for English and civics classes.<sup>129</sup> Finally, refugees may prefer to retain their foreign citizenship, because they hope to return to their home countries when conditions improve.<sup>130</sup> Under these circumstances, immigrants, especially the elderly, would encounter substantial difficulty in becoming naturalized citizens before applying for federal benefits.

The current proposals to cut public benefits to immigrants rely on xenophobia and the misconceptions that immigrants come to the U.S. to obtain welfare, use a disproportionate share of welfare once they arrive, and do not contribute to the nation's economy. Reducing federal benefits would place substantial burdens on states, charitable providers, the health care industry, and U.S. citizens with immigrant family members. Finally, naturalization does not provide an easy answer to the problems cutting immigrants' benefits would create.

## VI. MAKING THE ULTIMATE DECISION TO CUT FEDERAL BENEFITS TO IMMIGRANTS

Those on both sides of the controversy over the future of

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123. *Id.*

124. NATIONAL IMMIGRATION FORUM, FINANCING WELFARE BY CUTTING FEDERAL BENEFITS TO LEGAL IMMIGRANTS 3 [hereinafter NIF, FINANCING WELFARE].

125. *Id.*; see INA § 316(a), 8 U.S.C. § 1427(a) (1988 & Supp. IV 1992).

126. NIF, FINANCING WELFARE, *supra* note 124, at 3.

127. *Id.*; see INA § 312 [8 U.S.C. § 1423] (1988 & Supp. IV 1992).

128. NIF, FINANCING WELFARE, *supra* note 124, at 4.

129. *Id.*

130. *Id.*

immigrants' benefits have drawn their battle lines. While arguments on both sides carry objective and emotional appeal, many questions and issues remain unexamined.<sup>131</sup>

Reducing or eliminating federal benefits to aliens would signal "a significant change in public policy."<sup>132</sup> The present legal distinctions between aliens and citizens under federal law go to the very essence of membership in a political community.<sup>133</sup> Whatever the reasons for limiting certain rights and privileges to citizens, those reasons do not justify distinguishing between citizens and noncitizens with respect to

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131. One open question concerns the constitutionality of cutting welfare benefits on the basis of alienage. While arguments can be made that the current welfare reform proposals would violate the Constitution's Equal Protection Clause, it is not clear that a federal court would invalidate a law cutting alien's benefits.

While the Supreme Court has struck state laws discriminating against aliens, it has done so partially due to recognition of the exclusive federal power over aliens. See *Graham v. Richardson*, 403 U.S. 365 (1971). Recognition of Congress' plenary power has made the Court reluctant to carefully scrutinize federal laws affecting aliens. In *Mathews v. Diaz*, 426 U.S. 67 (1976), the Court applied deferential review to a federal law restricting aliens' access to the Medicare program. Under 42 U.S.C. § 1395o(2), an alien over 65 could not obtain benefits unless he had been admitted for permanent residence and had resided in the U.S. for at least five years. Noting Congress' "broad power over naturalization and immigration," the Court held the restriction did not violate the Fourteenth Amendment. 426 U.S. at 79-80. The Court stated that "[i]n the exercise of its broad power over naturalization and immigration, Congress regularly makes rules that would be unacceptable if applied to citizens. . . . The fact that an Act of Congress treats aliens differently from citizens does not in itself imply that such disparate treatment is 'invidious.'" *Id.* The Court noted that "it is obvious Congress has no constitutional duty to provide *all* aliens with the welfare benefits provided to citizens." *Id.* at 82. To the extent *Mathews* would control, it seems unlikely that a congressional decision to cut federal benefits to aliens would violate the Constitution.

132. Fix & Passel, *supra* note 74, at B7.

133. DAVID S. WEISSBRODT, IMMIGRATION LAW AND PROCEDURE IN A NUTSHELL, § 12-1.1, at 278-79 (3d ed. 1992). Weissbrodt cites *United States v. Cruikshank*, 92 U.S. 542 (1875), in which the Supreme Court stated:

Citizens are the members of the political community to which they belong. They are the people who compose the community, and who, in their associated capacity, have established or submitted themselves to the dominion of a government for the promotion of their general welfare and the protection of their individual as well as their collective rights.

92 U.S. at 278.

As members of the U.S. political community, U.S. citizens enjoy the full protection of the Constitution and the right to vote. *Id.* While aliens within the United States enjoy certain constitutional protections, they cannot vote. *Id.* On the other hand, citizenship imposes certain responsibilities, such as military service and jury duty, from which aliens are exempt in the former case, and excluded in the latter case. *Id.* at 279.

eligibility for public benefits. Eligibility for public benefits is linked to membership in an economic and social community. Welfare laws represent a democratic desire to give the disadvantaged a chance to become productive, or at least to enjoy a minimal standard of living.<sup>134</sup> Public benefits programs strive to assist participants to become productive, self-sufficient members of the economic community, and to provide for those who cannot provide for themselves.<sup>135</sup> In these ways, welfare assists the operation of the free market, and benefits society at large.

Noncitizens are inextricably involved in the economic life of the nation. If the goal of welfare reform is to put people back to work, no reason exists to distinguish between aliens and citizens, because both groups benefit society by working, earning, and spending money, and by paying taxes.<sup>136</sup> Cutting or eliminating tax-funded benefits to a class of persons that pays taxes is fundamentally unfair. Putting immigrants on welfare back to work under a reformed welfare system will make those individuals assets to our society, while eliminating benefits will only make them burdens on state welfare programs and local clinics, hospitals, and charities.

## VII. CONCLUSION

Given the many proposals to reduce or eliminate federal benefits to aliens and the broad support that they enjoy, some reduction of benefits to noncitizens seems inevitable. But welfare reform should not come at the expense of leaving entire groups in our society destitute. The programs from which immigrants would be denied benefits provide subsistence-level income to those who lack resources and would otherwise face abject poverty, with all its ugly trappings. Can our nation

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134. Of course that statement only applies to those with the particular disadvantages a given benefits program attempts to alleviate.

Welfare mothers hopefully become working mothers. Children receive food so they can grow and learn. The elderly and the disabled receive preventative health care so they and society can avoid more costly emergency room visits and hospitalizations. At best, welfare gives potentially productive individuals the chance to realize their potential. At least, welfare minimizes the economic burden of the unproductive.

135. See, e.g., 42 U.S.C. § 601 (1988) (providing in part that the purpose of AFDC is "to help maintain and strengthen family life and help . . . parents . . . attain or retain capability for the maximum self-support and personal independence consistent with the maintenance of continuing parental care and protection").

136. See generally CARLINER, *supra* note 59, at 201-09.



really say to people living here that just because you are not a citizen, "not only do we not care about you, we do not care about your children"?<sup>137</sup>

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137. 139 CONG REC. E3034 (daily ed. Nov. 24, 1993) (statement of Rep. Martinez).

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